NORTH AMERICAN REVIEW.

No. CCCCVII.

OCTOBER, 1890.

A WORD AS TO THE SPEAKERSHIP.

BY JAMES BRYCE, M. P., AUTHOR OF "THE AMERICAN COMMONWEALTH."

THE editor of THE NORTH AMERICAN REVIEW has asked me to take some part in the interesting controversy which has been carried on in several recent numbers of THE REVIEW upon the functions of the Speaker of the House of Representatives, upon the action of the present Speaker in counting members present, but not voting, for the purposes of a quorum, and upon certain changes that have been recently made in the rules of the House. This is an undertaking which I must respectfully decline, not merely because it involves matters of party dispute in the United States, wherewith a stranger ought not to intermeddle, but also because it raises fine points of constitutional law on which it would be presumptuous for a stranger to pronounce an opinion. All I can attempt is to state some considerations regarding the nature of the Speaker's office and the best modes of dealing with obstruction, or, as it is called in America, "filibustering," which are suggested by the recent experience of the British Parliament; a body in which questions of this kind have been largely canvassed during the last ten years, and in which experiments full of interest for Americans as well as Englishmen have been tried.

The conduct of government by assemblies of men instead of by individual men is proverbially one of the most difficult things in the world. When the number of an assembly rises beyond thirty or forty, so that conversation is superseded by speech-making, the difficulty increases in proportion. When the number passes one

hundred and fifty or two hundred, a new element of trouble is introduced in the excitement produced by the sympathy of a multitude, under whose influence men will say and do things which the judgment of a single man or a small group would at once condemn. Legislation is government: a great deal of legislation in the British Parliament and a good deal even in Congress are scarcely distinguishable from executive government. To be efficient, a governing assembly must be able to economize its time. It must be able to reach a prompt decision and a clear decision—a decision which represents not a mixture of several discordant views, but that one self-consistent view which seems the best of all that have been suggested. There must, therefore, be some method of enabling an assembly to act promptly and vigorously—that is to say, of ascertaining its collective will and giving effect thereto. It was long ago perceived that the only way of determining and using the will of an assembly, in which there may be as many opinions and wills as there are individuals, is to take the will of the majority as being the will of the whole. The majority may be wrong, but presumably it is more likely to be right than the minority, and it, at any rate, represents a presumably physically-stronger mass of men. The majority, therefore, is treated as if it were the whole assembly. Its will is the assembly's will; and it becomes entitled to use all the means necessary to make its will effective by reaching prompt and clear decisions.

Nevertheless, a divided assembly cannot be treated as a unanimous assembly. The fact that there is a minority which entertains a different opinion has material consequences, and calls for some limitation of the powers of the majority. Full and fair discussion of the questions to be decided must be secured, not simply for the sake of the so-called rights of the minority, but in the interests of the whole people whom the assembly represents. It is always possible that discussion may change the views of the majority, convincing some, at least, of them that their first impressions were erroneous, and so shifting the numerical preponderance in the assembly. It is also possible that such discussion may affect opinion in the country at large, and that the time occupied by discussion may enable manifestations of opinion from outside to reach and affect the majority so as to change its views. And even if no change in the assembly results, but the majority persists in its first view, it is clearly desirable that the country

should perceive that the matter has been duly considered, objections advanced, arguments *pro* and *con* sifted, so that the minority may not go away with a rankling feeling of injustice, and that the law or act which the vote of the assembly has approved may have the better chance of being loyally accepted and obeyed by the people as a whole.

These considerations, of whose importance many illustrations could be given from English and American history, were so much regarded in England that till a very recent period no limit whatever was placed on the duration of Parliamentary debate. Speeches might be of any length, even in Committee of the Whole. Questions might be discussed for any number of hours or days. Amendments might be multiplied to any extent, so long as they did not offend against the rules by raising afresh a question already disposed of. Motions to adjourn the House, or to adjourn a debate, or to report progress when the House was in committee, were always in order. Now and then, when party feeling ran unusually high, as in the debate on the great Reform Bill of 1832, discussion was so intolerably prolonged that it passed into filibustering. But in general the good feeling of men who mostly belonged to the same social class and were in the habit of meeting one another on social occasions, the obedience of the followers to the leaders, the interest which the leaders of an opposition had in checking practices sure to annoy themselves when they in turn came into power, and, above all, the generally-diffused respect for the dignity and authority of the House, combined to prevent abuse of the great latitude which the rules allowed.

Systematic obstruction seems, in recent years, to have been first tried in 1872, when the bill for the abolition of purchase in the British army was pertinaciously, but unsuccessfully, resisted by a group of members in the interest of the officers. In 1877 and the following years it was again resorted to by a section of the members from Ireland, who found in it an effective and not unconstitutional means of calling attention to their contention that the British Parliament was unfitted to deal with Irish questions. Their opposition to the Coercion Bill brought in by Mr. W. E. Forster in 1881 was so persistent and protracted that it had to be overcome partly by the action of the Speaker in interrupting a member while actually speaking, and putting the main question on his own authority,—a proceeding for which there was no prece-

dent,—and partly by the passing of some temporary rules called "Rules of Urgency," which were used in the sessions of 1881 and 1882, but have not since been revived. However, in 1882, a new set of regulations was enacted; and among these the power of closure—called in America the "previous question"—was for the first time introduced. It was strenuously resisted by the party who were then in opposition, but when that party found themselves in power in 1887, they were obliged, by the evident impossibility of pushing through business without some means of bringing debate to an end, to enact a code of rules stricter than those of 1882. Under this code, which is that now in force, any member may move "that the question be now put," and "unless it shall appear to the Chair that such motion is an abuse of the rules of the House or an infringement of the rights of the majority," the question shall be put forthwith and decided without debate. It is, however, required that at least one hundred members shall vote in the majority for closure. The Chair has also the power to refuse to put a motion "that the House do adjourn," or "that the chairman do report progress" or leave the chair, if he thinks such motion an abuse of the rules; and he has, further, the power of calling on members who, in his opinion, frivolously or vexatiously claim a division, to rise and he counted in their places. But there is no limitation on the length of speeches or on the number of times the same member may speak in committee.

It will be noticed that under these rules the functions of the Speaker are very important. The rules of 1882 gave to him the right of informing the House if he thought the time for closing a debate had arrived, so that a motion to that effect might then be made. The rules of 1887 allow him to interpose his veto, or, rather, to refuse to put a motion actually made for ending the debate, where he thinks that the necessity for such a motion has not arisen. This provision for the interference of the Speaker is a provision unknown to Congress, and, of course, quite unknown in the earlier history of Parliament. What were the reasons which suggested it?

There was a strong repugnance in the House of Commons to the closure (as we in England call the previous question) pure and simple. We are a conservative people, and shrink from taking long steps if it is possible that short ones may do. Moreover, the ministry who proposed the closure felt that they might before

long become an opposition, and be silenced by the application of the very "gag," as its enemies called it, which they had just invented. Some safeguard against the abuse of the closure was thought essential. The obvious safeguard, and that which the Tory party had approved in 1882, was to require a proportional majority, say of two-thirds, to pass a closure vote. But to this plan there was the fatal objection that, though it would be effective against a small section of the House, it would be useless against the opposition as a whole, since a party in power can very seldom command a two-thirds' majority. The only alternative, therefore, was to vest in the presiding officer a discretion to protect the minority by refusing to let a closure motion be voted on.

American readers may be surprised to hear that any protection for minorities was expected from the presiding officer. In Congress the Speaker is for many purposes the leader of the majority. The majority is often advised by him, and usually reckons on him to help it to carry out its will. The hare might as well hope that the huntsman would call off the hounds as the minority expect the Speaker to restrain an impatient majority. But in Parliament the Speaker and the chairman of committees (whom for shortness I generally include when I refer to the Speaker) are and have always been non-partisan officials. Each, no doubt, has belonged to a party and has been chosen on the proposition of a party leader. But the Speaker is deemed, once he has assumed the wig and gown of office, to have so distinctly renounced and divested himself of all party trappings that, if he is willing to go on serving in a new Parliament in which the party to which he belonged is in a minority, the majority is, nevertheless, expected to elect him anew. Thus Speaker Brand, although he had once been whip of the Liberal party, was reëlected Speaker in 1874 by the Tory party, which had then gained a majority, and served on till 1883. The Speaker is not permitted, so long as he holds office, to deliver any party speech outside Parliament, or even to express his opinions on any party question; and in the chair itself he must be scrupulously fair to both parties, equally accessible to all members, bound to give his advice on points of order without distinction between those who ask it. It is to this impartiality, which has never been wanting to any Speaker within living memory, that the Speakership owes a great

part of the authority it enjoys and the respect it inspires. And for that very reason many prudent statesmen condemned in 1887 the rule which lodged in the Speaker's hands this discretionary power to put or refuse to put a motion for the closure of debate. They argued that such a function imposed too severe a strain upon the Chair, whose action was likely to be condemned by partisans on one side or the other. Things might be said by angry members, comments might be made in the public press which would sap the deference hitherto paid to this exalted office. It was not, however, I must again repeat, intentional partisanship on the part of the Chair that was feared, but occasional errors of judgment which might breed criticism and censure. The traditions of the Speakership have acted so strongly on those who have held the office, and have so permeated the political life of England, that practical politicians believed the Speaker would use his new powers in a fair and impartial spirit.

How, then, have these new powers been, in fact, used, and what has been the result upon the House of Commons of the rules which sanction the closure? This is a question of interest for the Senate of the United States, which has recently been invited to enact a "Previous-Question Rule" for itself. But it is one which cannot as yet be answered adequately, for four sessions are a short time in which to test an institution. At present we have two exceptionally firm and fair-minded men presiding over the House and over Committee of the Whole. Their disposition seemed at first to be to construe very strictly the rule which gave them a veto, and to allow the motion for closure to be voted on unless there was a palpable impropriety in making it; in the view, apparently, that the responsibility of closing the debate belonged to the House itself, and that, if the majority determined to close it, they ought, unless under circumstances so flagrantly unjust as to demand the Chair's interference, to bear the sole responsibility and the consequent approval or censure of public opinion.

It was soon perceived, however, that this was a responsibility which the majority were ready to accept with a very light heart. Majorities are usually impatient and anxious to go home to dinner or to bed. They are very loyal to their leaders when action of a distinctly party nature is to be taken. Under our English practice, moreover, the majority consists largely of per-

sons who have been lounging or playing chess in the smoking-room, or writing letters in the library, and who, rushing into the House when the division bells ring, know nothing about what has passed, but vote just as the party whips tell them. Experience, in fact, showed that, whenever a leader of the majority moved the closure, the majority would vote for it, and showed also that the chiefs of the majority cannot be trusted to move it only on proper occasions. The present leader is a diligent and kindly man, who (as he has often declared) desires to do his duty to his Queen and his country—nothing more and nothing less. Yet even he, and his lieutenants much more frequently than he, repeatedly err in demanding the stoppage of debate when discussion is proceeding in a legitimate way, and members well entitled to be heard desire to speak. The most sensible and best-intentioned ministers must sometimes commit such errors, for their great anxiety is to press on their own business, and they forget that, even assuming proposals to be substantially good, the House and the country are entitled to satisfy themselves by ample debate that such is the fact. Accordingly the Chair has latterly tended to take a somewhat wider view of its own functions in the matter, and has frequently refused to put a closure motion even when the leader of the majority claimed to have it put, declaring that, as it was not clear that the main question had been fully discussed, debate ought to be suffered to proceed.

Thus the closure, though now more frequently applied than was intended when it was introduced iu 1882, has curtailed the freedom of debate less than might have been expected. This, however (I must repeat), has been due, not to any scruples on the part of the majority, but to the action of the chair, which has protected the minority in a way that has more than once irritated the hotter spirits among the rank and file of the majority. Let it, however, be remembered that we in England have had an experience of three and a half years only. Those who occupy the chair in future may be less scrupulously fair than Mr. Peel and Mr. Courtney have shown themselves. The majorities of the future, perceiving how much a biassed Speaker can aid them, may resolve to choose men of less impartial mind; and the result of giving to the Speaker these great political powers—for political they are—may be ultimately to alter the conception

and character of the Speakership itself and turn it into a partisan office.

It cannot be doubted that, if the control now exercised by the Chair were withdrawn, the closing power would be constantly and recklessly used. A majority is the least scrupulous thing imaginable, because everybody puts his conscience into the keeping of his party, and the party justifies its conduct, sometimes by supposed zeal for the public interest, always by its corporate spirit. Nothing restrains it but the fear of public opinion. And English experience, so far as it has yet gone, shows that the fear of public opinion is, in ordinary cases, only a feeble protection. The country does not, even with our comparatively full newspaper reports of the proceedings of Parliament, realize what passes there. It does not know when obstruction is being practised, and apparently does not much care; for each party habitually accuses its opponents of obstruction. So, too, the country does not seem to resent the application of the closure, unless an instance of oppression arises so patent and glaring that it can be made clear to the meanest understanding. Probably, therefore, unless the interposition of an impartial Chair continues to govern the development of our Parliamentary habits, the closure will come in time to be as frequently employed at Westminster as at Washington. The minority, when they are now silenced by it, console themselves with the thought that their turn will come. "We are chastised with whips, but when we are the majority, we will chastise them with scorpions." The minority in the next Parliament will, when they suffer, comfort themselves in like manner. As in the civil wars of the Roman republic, each faction, when it came into power, took a more ferocious revenge upon its enemies than those enemies had taken upon it before, so the tyranny of a majority in the legislature is likely to become more and more pronounced on every change of power from party to party.*

*I have not referred in these remarks to the most dangerous form which an application of the power of closing debate takes viz., that of fixing a day and hour at which all discussion of a particular bill shall cease, and after which no amendment can be voted on, but the bill shall be passed or rejected as a whole, because this form is entirely independent of the action of the Chair, being prescribed by the vote of the majority only. It has twice been resorted to in the present Parliament; whether wisely or not I do not now inquire. On both occasions it has excited the strongest resentment and been recognized to be a weapon liable to grave abuse on the part of a tyrannical majority.

A few words only are needed as to the other powers over debate which the new rules give to the Speaker in England. The power of refusing to put a dilatory motion because, in the opinion of the Chair, it is an abuse of the rules of the House, has been seldom resorted to, because its mere existence has done much to check these motions when they are frivolous or vexatious. It has proved a valuable power, and not least so because the Chair, by refusing to use it when the majority desired to see it used, has indirectly intimated the opinion that a protracted discussion which the majority disliked was in fact legitimate. More than once during the session of 1890 things would have taken a quite different turn if the Chair had used this power in the way the majority desired. The right of requiring members to rise in their places and be counted, instead of going through the division lobbies,—a process which consumes from eight to fifteen minutes,—has been still less frequently employed; but the fact that it exists has tended to check purely frivolous divisions, and no complaint (so far as I know) has been heard of any mistakes made by the Chair in applying either these rules or that under which a member indulging in tedious, repetitious, or irrelevant remarks may be directed to resume his seat.

The conclusions which may be fairly deduced from the history of Parliamentary procedure in England during the last ten years seem to be the following :

That some power of terminating debate by closure, or previous question, had become absolutely necessary.

That a majority is certain to abuse this power—*i. e.*, to use it where it is not absolutely required, and where its use is not only oppressive, but prejudicial to the public interest.

That the veto of the Chair has tended to check such abuse and has given frequent protection to the minority.

That the conduct of the Chair, whether or not it has been always right, has been invariably impartial, so far as intentions went, and that its reputation has not hitherto suffered.

That it is, nevertheless, possible that English ministers and majorities may in the future desire to have a partisan in the chair, seeing how helpful he may be to them, and that the traditional character of the Speakership is, therefore, not exempt from danger.

On the whole, therefore, we in England are not disposed to

retrace the steps we have taken. The House of Commons could not get on without a closure. But the incidental evils are real evils, and we look with some anxiety to the future.

Let me now attempt, before closing this paper, to apply what has been said regarding the House of Commons to the questions of Congressional procedure which have been fought over in the pages of THE NORTH AMERICAN REVIEW.

There are three conspicuous differences between the position and practice of either house of Congress and that of either house of Parliament.

The House of Representatives is not supreme over its own procedure. It is subject to the Constitution, which has absolutely secured to a minority of one-fifth of a quorum the right to have the names of the yeas and nays on a division entered on the journal—a right which not only tends, but invites, to filibustering. The House of Commons, on the other hand, can take its divisions in any way it pleases, recording the names or not. Owing to its method of making the Ayes and Noes walk through different lobbies, it takes its divisions in less than half the time occupied by the calling of the roll in the House of Representatives, although the number of members in the House of Commons is more than double that of the House of Representatives. Moreover, the Constitution of the United States expressly confers upon the House certain powers which there is nothing in English law to prevent the House of Commons from delegating, if it pleases, to the Speaker. That the House of Representatives cannot delegate these powers has been powerfully argued by Speaker Reed in the pages of this REVIEW. Thus the House of Commons is in several respects far more completely master of the situation than its trans-Atlantic compeer.

In the United States long habit has made the Speaker a recognized partisan—a partisan limited, no doubt, by usage and good feeling, but still understood to be entitled to use his power in the interest of his party. In the House of Commons he is expected to be absolutely impartial. Consequently many powers may be intrusted to an English Speaker, whose equity and fairness are above suspicion, which it might in America be unsafe to commit to one who is virtually, however personally honest, a party chieftain.

In both Houses of Congress another long habit has established the right of members to be physically present during a division

and yet to abstain from voting. In both Houses of Parliament every member present has always been held bound to vote, and recusant members have more than once been positively compelled to vote. The only resource of a person who seeks to escape this duty is to hurry out of the House before the two minutes allowed for members to come in have elapsed and the doors have been locked. I do not know whether the American habit of permitting members to have each his own desk, where he can read and write, has anything to do with this permission to remain a silent spectator of a division. To us Englishmen both the desks and the habit of non-participation while physically present, as well as the right to change one's vote while the division proceeds, seem unfortunate; and we are not surprised that technical difficulties should arise out of the regulations for a quorum where the anomaly exists of divisions of the House which are not divisions of the whole body of members present. Such a question as that which Speaker Reed decided, and his decision on which has been embodied in the rule since enacted by the House, could not have arisen at Westminster, where we know of only one quorum—the quorum consisting of every member within the four walls of the chamber whom the eye of the Speaker sees and his finger (or, rather, the cocked hat he points with) and voice count audibly when a count is required.

If an English member were asked to give his *primâ facie* impression on the point, he would probably answer that the view which recognized those who were physically present as being also legally present commended itself to his common-sense. The ingenious argument of X M. C. would puzzle him. But he would say that, technicalities apart, there seems something absurd in attributing more effect to the action of those who seek by abstaining from voting to defeat the passage of a motion than to that of the same persons voting against the motion. To abstain seems less than to oppose. Yet under the method of resistance which Speaker Reed defeated it would have counted for more.

As regards the power now conferred on the Speaker of the House of Representatives to refuse to put a dilatory motion which he deems frivolous or obstructive, I have already remarked that it has been recently given to the English Speaker and used with results generally admitted (up to the date of this writing) to be excellent. Whether it would be equally safe in the hands of the

Speaker at Washington is a point on which a stranger must not express an opinion, though he may remark that the bestowal of it on the Speaker in England would have been resisted but for the confidence felt in the superiority of that officer to party bias. There are cases which imply dilatory tactics, as, for instance, where a measure is being pressed through before the country has had time to understand it and express its opinion regarding it. In such cases the indulgence which a wise chairman will extend to dilatory motions may be serviceable. I do not, however, deny that times may be imagined in which the power in question might have to be intrusted even to a partisan Chair. A governing assembly cannot suffer itself to be paralyzed; it must, at whatever risk to minorities, find some method of despatching its business. In England, where everything depends on the action of Parliament, this first duty of self-preservation is, perhaps, more imperative than in the United States. In England, on the other hand, the harm that may follow a rash and violent exercise of the force of a Parliamentary majority is greater than in the United States, because the House of Commons is not restrained, like the House of Representatives, by other constitutional authorities. The House of Lords can, no doubt, resist the Commons, and does so when the Liberal party commands a majority in the latter body. But the House of Lords will not stand long as it stands now; and when the inevitable struggle between it and the Lower House has been fought out, its submission, or perhaps its virtual extinction, will leave the fortunes of the nation at the mercy of the majority in a single popular assembly. These questions of procedure, therefore, and the maintenance of the dignity of an impartial Chair, on which the conduct of procedure now more than ever depends, are questions of even more vital significance to Britain than they are to the United States.

There is another question to which Speaker Reed has adverted in his interesting article in the July number of this REVIEW, on which a few words may be said, because British experience is in point. It is the question of saving the time of Congress by referring the decision of contested elections to a judicial tribunal instead of to a Committee of the House. I have already had occasion to observe that, where long traditions and deep-rooted habits have attached the character of impartiality to an office, functions

which in other hands might be dangerous may (for a time at least) be safely intrusted to the holder of that office. Nothing rouses more party feeling in England, as well as in America, than a contested election. No class of cases had given so much trouble to Parliamentary committees and caused so much scandal as cases of elections petitioned against on grounds of bribery or treating or intimidation. The decisions of these committees inspired little confidence, for they were usually colored by party feeling; the procedure was costly and tedious; the rules of evidence were often laxly applied. It was at last proposed to take the trial of such election petitions out of the hand of Parliamentary committees and intrust it to the judges of the Superior Courts of Common Law. Many constitutional authorities doubted the wisdom of this proposal, predicting that the result would be to drag the judges into the political arena, to expose them to imputations of unfairness, to injure the standing and credit of the Bench as a whole. The judges themselves protested strongly. Parliament, however, persisted in the teeth of their protest, and since 1868 all election cases have been tried by judges at the spot where the election took place, points of law being reserved for the decision of the courts in London. The general elections of 1868 and 1874 produced a whole crop of petitions. Here and there a judge was supposed to have dealt somewhat too leniently with a political friend or with an eminent politician, whether or no of the same party as himself. But, speaking generally, the fairness of the judges, who, be it remembered, sat as judges of fact without a jury, was conspicuous, and very few of their decisions failed to command public approval. The experiment was so evidently a success that no one has subsequently proposed to revert to the former method of trial.

Since 1874 very few election petitions have been presented, so that the matter has almost passed out of the knowledge or attention of the public. But our experience in 1868 and 1874 was certainly such as to recommend the plan for at least a provisional adoption in America, assuming that the constitutional obstacles do not prove insuperable. It may, however, be doubted whether it would be prudent to set Federal district judges to try election cases arising in their own respective districts. English experience showed the advantage of having a tribunal en-

tirely exempt from local influences; and similar considerations might be expected to apply in the United States, where the ties of party loyalty generally, and of local party feeling in particular, are probably stronger than they were in England in 1868. A judge wholly unconnected with the locality would seem better fitted for the duty than one habitually resident in the district. The substitution of judges for Parliamentary committees has, by making trials speedier and detection more certain, become one of the expedients, along with more stringent penalties, with a secret ballot, and with the enlargement of constituencies, whereby we have so dealt with bribery and intimidation that these old scandals of representative government have almost ceased to exist among us.

JAMES BRYCE.